

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 3288 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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JAMNAGAR MUNI.CORPORATION - Petitioner(s)
Versus
REGIONAL DIRECTOR & 2 - Respondent(s)

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Appearance :

MR AR THACKER for Petitioner(s) : 1,
None for Respondent(s) : 1 - 2

MS ARCHANA RAVAL, A.G.P. For Respondent no.3.

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 08/03/2006

ORAL JUDGMENT

1. Heard learned advocate Mr. J.R. Nanavati for learned advocate Mr. A.R. Thacker on behalf of the petitioner. Learned A.G.P. Ms. Archana Raval

is appearing on behalf of respondent no.3.

2. In the present petition, petitioner has challenged the letter dated 17th February 2006 issued by respondent no.1, except that, there is no challenge raised by the petitioner.

3. The brief facts of the present petition is that Jamnagar Municipal Corporation has been exempted by notification dated 12th May 1989 issued by the Labour and Employment Department in exercises of the power conferred by Section 90 of the Employees' State Insurance Act, 1948 (hereinafter referred to as 'the E.S.I. Act' for short). According to said notification, Government of Gujarat exempts the Transport Service and Water Works, Jamnagar Municipal Corporation, Jamnagar from the operation of the Employees' State Insurance Corporation (hereinafter referred to as 'E.S.I. Corporation' for short). The letter dated 10.1.2004 / 30.03.2004 served to the petitioner by E.S.I. Corporation under Section 40 read with Section 39 of the Act. This letter issued to the petitioner as a principal employer of the factory / establishment covered under the E.S.I. Act. In the said letter, the E.S.I. Corporation has

proposed to afford M/s. Jamnagar Municipal Transport Service an opportunity to show cause against the said determination and recovery. The amount of contribution had been determined by the E.S.I. Corporation under Section - 45(A) of the E.S.I. Act. In the said letter, it is specifically made clear that in case, if, petitioner is not the principal employer, or have ceased to be the principal employer, the request was made to intimate the date from which the petitioner ceased to be the principal employer and also intimate the name of the new principal employer. The petitioner has not availed opportunity as given in letter dated 10.1.2004 / 30.3.2004 Thereafter, the order dated 4th January 2005 passed by the E.S.I. Corporation under Section 45(A) of the E.S.I. Act, wherein, it is specifically made clear that employer means petitioner as neither replied to the aforesaid notice dated 30th March 2004 nor availed personal hearing before the Joint Director on 22nd April 2004 and 17th June 2004 against the assessment as proposed in the statement enclosed with the show cause notice. In the said order, it is also made clear by the Deputy Director, in exercise of power delegating to him by the E.S.I. Corporation to order, that contribution totally

Rs.10,20,228/- for the period from May-1990 to March-1992, April-1992 to December-1996 and January-1997 to December-2003 are finally determined. Therefore, it was ordered by the Corporation to pay the above amount within a period of 15 days from the date of this order, failing which this shall be caused to be recovered under Section.45(C) to Section 45(I) of the Act. Annexure 'E' at page 22 indicates the letter by the petitioner dated 15th June 2005 addressed to the Deputy Director, wherein, it was pointed out by the petitioner that establishment had already been granted exemption from the provisions of E.S.I. Act and copy of the notification was sent along with the said letter. Annexure 'F' page 23 indicates that it is a letter dated 20th May 2005 from the E.S.I. Corporation addressed to the Recovery Officer, E.S.I. Corporation, Ahmedabad. This order dated 20th May 2005 is against one Pradeepbhai Sharma who is Principal Employer of the establishment and claim for Rs.11,87,937/- plus interest at the rate of 15% per day with effect from 1st June 2005. Thereafter, a letter dated 25th May 2005 at Page 26, Annexure 'G' from the E.S.I. Corporation addressed to Shri Pradeepbhai Sharma, Jamnagar Municipal Transport Service, Jamnagar from

Recovery Officer of E.S.I. Corporation directed to pay the above sum within 15 days of the receipt of this notice failing which the recovery shall be made in accordance with the provisions of Sec.45(C) to Section 45(I) of the Act as amended.

4. On behalf of the petitioner, by letter dated 27th May 2005, one letter was addressed to the Regional Director and pointing out the same contentions that Jamnagar Municipal Corporation Service, Transport Department is already exempted from the coverage of E.S.I. Act with effect from 3rd July 1989.

5. Thereafter, one legal notice dated 8.2.2006 was served to the E.S.I. Corporation by the advocate of the petitioner.

6. It is also indicated by Annexure 'J', page 31 that a letter from E.S.I. Corporation from the office of the Recovery Officer addressed to one Mr. K. Benarji, The Manager, Union Bank of India with a direction to pay the amount collecting from the account of the petitioner and to issue demand draft in favour of the 'E.S.I. Fund A/c. NO1' payable at Ahmedabad immediately and

handover it to Recovery Officer, otherwise, you will be considered as 'Deemed Defaulter' under IInd and IIIrd Schedule of Income Tax Act. This letter is dated 17th February 2006 which is not addressed to the petitioner. It is addressed to the Manager, Union Bank of India, Jamnagar. It is necessary to note that in the said letter, the Recovery Officer of E.S.I. Corporation has given an opportunity by the letter which read as under :

"However, before initiating any unpleasant action to recover this amount, you are hereby afforded an opportunity to show cause personally on 28/02/2006 at 11.00 a.m. before the undersigned by this amount be not recovered from you considering you as DEEMED DEFAULTER under second and third schedule of Income Tax Act, 1961. You also advise to bring the copy of statement of the accounts for the period 21/10/2005 to till date in respect of Jamnagar Municipal Corporation. You are further ordered to stop any flow of funds immediately till the clearance of the statutory dues of E.S.I. Corporation."

7. The office order passed by the Jamnagar Municipal Transport Service at page 33 indicates that 18 employees have been exempted from the coverage of E.S.I. Scheme with effect from 1.6.1989 as per notification dated 8th June 1989.

8. Except this, no other letter or documents are on record in the present petition. One fact is very clear that except the order or letter dated 17th February 2006, there is no challenge in the present petition by the petitioner. This letter is not addressed to the petitioner. No copy of the said letter is served to the petitioner. Even though, the petitioner has challenged the said letter

dated 17th February 2006 in the present petition.

9. Learned advocate Mr. J.R. Nanavati appearing on behalf of the petitioner submitted that Jamnagar Municipal Transport Service is exempted from the coverage of E.S.I. Act which fact was informed to the Corporation by the petitioner. The copy of the said notification was also supplied to the Corporation and according to him, E.S.I. Corporation has no jurisdiction to demand any amount of contribution from the petitioner.

He, further, submitted that the petitioner has no alternative remedy. Section 75 is not applicable. He read Sec.75 of E.S.I. Act before this Court and pointed out that E.S.I. Court has no jurisdiction. Except that, no other submission is made by the learned advocate Mr. J.R. Nanavati appearing on behalf of the petitioner. No other decision has been relied by the learned advocate Mr. J.R. Nanavati.

10. I have considered the submission made by the learned advocate Mr. J.R. Nanavati on behalf of the petitioner. I have perused the entire record produced by the petitioner. Looking to prayer clause, paragraph no.12-A and 12-B are quoted as under :

Prayer - 12 (A) : The Honourable Court may be pleased to issue a writ of mandamus quashing and setting aside the recover proceedings initiated by respondent no.1 by issuing letter dated 17.2.2006 and hold that respondent nos. 1 and 2 have no right to demand the contribution of ESI under the Act and further direct the respondent nos.1 & 2 to returned Rs.13,03,464.00 forthwith

which they have collected from the Union Bank of India, Ranjit Road, Jamnagar from the account of petitioner Corporation pursuant to letter dated 17.2.2006 of respondent no.2 and allow this petition.

Prayer - 12 (B) : Pending hearing and final disposal of the petition, the Honourable Court be pleased to grant interim relief direct the respondent no.1 to return the amount of Rs.13,03,464.00 forthwith during the pendency and final disposal of this petition.

11. Looking to the aforesaid prayer, it covered by jurisdiction of E.S.I. Court under Section 75 of the Act. There is further remedy if E.S.I. Court passed order against the petitioner then appeal under section 82 is available to petitioner. So, it is complete Code / Act having remedy to decide any dispute or question arises under the Act. Then in such circumstances to by passed such provision and to approach directly High Court, is contrary to statutory provision of Act. The section 72(2)(a) covered the dispute / question raised by petitioner in present petition. The relevant Section 82 of E.S.I. Act

is as under:

Section 82- :(1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days.

(4) The provisions of sections 5 and 12 of the Limitation Act, 1963 (36 of 1963) shall apply to appeals under this section."

12. In view of the prayer as referred above, the petitioner has challenged the letter dated 17th February 2006 issued by the Recovery Officer of E.S.I. Corporation. Petitioner has not challenged the order dated 4.1.2005 passed by the E.S.I. Corporation which has been passed under Sec.45(A) of the E.S.I. Act. The subsequent steps through correspondence by E.S.I. Corporation is the consequence of this order. In view of this, not challenge the order passed by the E.S.I. Corporation under Section 45(A) against the petitioner and only the letter dated 17.2.2006 which addressed to the Manager of the Bank has

been challenged by the petitioner. According to my opinion, petitioner has no right to challenge the said letter dated 17.2.2006 before this Court. It was not addressed to the petitioner by the Recovery Officer. However, according to my opinion, the petitioner having alternative, effective and statutory remedy under Section 75 of the E.S.I. Act. Section 75 Sub-Section 3 made clear barred that no Civil Court has jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate or any liability which by or under this Act is to be decided by a Corporation or by a Medical Board or by a Tribunal. The relevant Section 75 of the E.S.I. Act, 1948 is quoted as under :

Section 75 - *Matters to be decided by Employees' Insurance Court* :

(1) If any question or dispute arises as to -

- (a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or*
- (b) the rate of wages or average daily wages of an employee for the purpose of this Act, or*

- (c) the rate of contribution payable by a principal employer in respect of any employee, or
- (d) the person who is or was the principal employer in respect of any employee, or
- (e) the right of any person to any benefit and as to the amount and duration thereof, or
- ²[(ee) any direction issued by the Corporation under section 55A on a review of any payment of dependents' benefit, or]

¹[***]

- (g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, ²[or any other matter required to be or which may be decided by the

Employees' Insurance Court under this Act],

such question or dispute ³[subject to the provisions of sub-section (2A)] shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) [Subject to the provisions of sub-section (2A), the following claims] shall be decided by the Employees' Insurance Court, namely :-

(a) claim for the recovery of contribution from the principal employer;

(b) claim by a principal employer to recover contribution from any immediate employer;

*⁴[***]*

(d) claim against a principal employer under section 68;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this Act.

(3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by [a medical board, or by a medical appeal tribunal or by the Employees' Insurance Court].

13. In view of Section 75 and entire provisions, according to my opinion, petitioner has raised dispute and also raised a question about the applicability of the Act or coverage of the Act and also liability to make payment of contribution to the Corporation. Therefore, this question is covered under the jurisdiction of the E.S.I. Court. In view of this fact, when the petitioner having alternative, effective, statutory remedy under the Act, the writ petition being an extra ordinary jurisdiction under Article 226 of the Constitution of India should not have to be entertained.

14. The similar question arose before Apex Court

and other High Courts. That when any question or dispute is covered by Section 75 of ESI Act and can be raised and decided by ESI Court constituted under Section 74 of the said Act, it will not be appropriate to decide the said question or dispute by any of writ petition under extraordinary jurisdiction under Article 226 of the Constitution of India. (See : K.P.Mishra Vs. State of Rajasthan reported in 1994 I CLR 136, Rajasthan High Court, 2) LML Limited Vs. ESI Corporation reported in 2000 LLR 289 All.). Similarly Bombay, Allahabad, Madras and Andhra Pradesh High Courts has decided.

14.1. The Hon'ble Madras High Court in case of ESVEES Vs. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION, reported in 2000 LLR 285, in Para.5 and 6, has observed as under :

"5. Even though learned Counsel of the petitioner submitted that he had closed down his business in the month of November,1980, and leased out his factory premises to Sigma Welds for some time, and thereafter to Hi-Q-Wire Processors, the particulars furnished or the record show that the petitioner has not informed the details of transfer of the respondents

Nos.1 and 2. As a matter of fact, he himself had admitted that the first lessee, namely, Sigma Welds have closed down their business within a short time. Even the other lessee, namely, Hi-Q-Wire Processors, have also vacated the premises after March 31, 1988. In the light of the above position, as admitted by the petitioner and in the absence of necessary particulars being furnished to the respondents, it is not open to the petitioner to attack the order passed by the respondents. As a matter of fact, before passing the impugned order, the petitioner was given an opportunity by way of show cause notice to raise his objection, if any. Even after granting adequate opportunities the petitioner neither paid the amount as determined nor explained his case for non-payment of the said amount. In such circumstances, the case of the petitioner cannot be accepted.

6. It is also clear from the counter affidavit that the "statutory Inspector" who verified the record of the establishment in the course of his

inspection on April 15, 1982, had found that the petitioner had employed 10 persons for wages. On the basis of the report submitted by the Inspector, the petitioner was intimated the code number and necessary steps to comply with the provisions of the Act, with effect from September 11, 1981. No material has been placed before the respondents to show that there was no need to comply with the said direction. Apart from the above factual position, in view of Section 93-A of the Employee's State Insurance Act, 1948, the petitioner cannot escape from the liability on the ground of transfer of the concern. Looking at any angle, I do not find any merit in the writ petition and the same is accordingly dismissed. No costs. Consequently, the interim stay granted in WMP No.5430 of 1989 is vacated."

14.2 The Hon'ble Andhra Pradesh High Court in case of Ashok Leyland Ltd. & Others Vs. Deputy Tahsildar (Recovery Cell), Collectorate, Hyderabad & Anr., reported in 2001 LLR 1087, in Para.2 and 3, has observed as under :

"2. The question as to whether an employer can maintain an action before the ESI Court questioning the liability under the ESI Act, fell for consideration before the Apex Court in Employees' State Insurance Corporation Vs. F. Fibre Bangalore (Private) Limited, 1997 (75) FLR 524 (SC), and in para.5 it was held :

'The Full Bench of the High Court has held that in a case where the order under Section 45-A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court, have it adjudicated and, then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to

be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise, the Act would become unworkable and defeat the object and purpose of the Act.'

3. Having regard to the aforementioned authoritative pronouncement of the Apex Court, we are of the opinion that all questions including the question of applicability of the ESI Act to the petitioner, can be raised before the Employees' Insurance Court. Therefore, the petitioners should avail the remedies available to them.

The above aspect of the matter was also considered by a Division Bench of Patna High Court in Shriram Bearing Limited Vs. ESI Corporation, 1997 Lab IC 1482 and N.P.Sing, J, as he then was, speaking for the Bench categorically held that even the Courts and Tribunals, constituted

under the ESI Act, have inherent power to issue appropriate relief by way of injunction to the party before it and can enforce the orders."

14.3 The Hon'ble Bombay High Court in case of Rainbow Industries Vs. Regional Director, ESI Corporation reported in 2001 LLR 420, in Para.7, 8 and 9, has observed as under:

"7. The ESI Act is a complete code in itself and it provides for each and every contingency to enhance welfare of the working class. It is an exhaustive piece of legislation and has also provide remedy against the orders of the competent authorities under Section 75 of the Act and also for an appeal against the order of the ESI Court. In the interest of the weaker section in the contingencies of their sickness, employment injuries and for females occasions of maternity the competent authorities under the Act are empowered to decide quickly the grant of benefits to the aggrieved beneficiaries. They are also denied an ordinary right of appeal

unless there is a substantial question of law involved. This is a legislative wisdom and policy, it cannot be easily and lightly departed from by allowing a clever and ingenious party to approach under Article 226 by reducing the writ jurisdiction to an alternate remedy to an appeal under Section 82 (2) of the ESI Act. The Supreme Court has in the case of C.A. Abraham Vs. Income Tax Officer, Kottayam and Anr. Reported in AIR 1961 SC 609 in para 3 has held in this context as under:-

'In our view the petition filed by the appellant should not have been entertained. The Income Tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income Tax Authorities, and the appellant could not be permitted abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the

Tribunal.'

8. The aforesaid decision was followed in the case of Shivram Poddar Vs. The Income Tax Officer, Central Circle-II, Calcutta and Anr. Reported in AIR 1964 SC 1095. The Supreme Court in Para.11 of the said decision has observed, thus :

'We may, observe that we have proceed to decide this case on the footing that the business of the firm was discontinued on dissolution of the firm. It is, however, necessary once more to observe, as we did in C.A.Abraham's case (1961) 2 SCR 764 (AIR 1961 SC 609) that Income Tax Act provides a complete machinery for assessment of tax and for relief in respect of improper or erroneous orders made by the revenue authorities. It is for the revenue authorities to ascertain the facts applicable to a particular situation, and to grant appropriate relief in the matter of assessment of tax. Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognized by the Constitution in matters

relating to assessment, levy and collection of Income Tax may be permitted only when question of infringement of fundamental rights arise, or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting to by-pass the provisions of the Income Tax Act by inviting the High Court to decide the question which the primarily within the jurisdiction of the revenue authorities. The party approaching the court has often to ask the Court to make assumption of facts which remain to be investigated by the revenue authorities.'

9. I am, therefore, not able to accept the submissions of Shri Naidu that the present writ petition is maintainable. He ought to have filed an appeal as provided under Section 82 of the ESI Act."

15. There is one apprehension in the mind of the Court that why the petitioner is insisted to this Court to exercise the power. The reason, according to my opinion, is obvious Section 75 Sub-section - 2(B) which is as under :

"No matter which is dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employers' Insurance Court unless he has deposited with the Court fifty per cent of the amount due from his as claimed by the Corporation."

16. So, probably, there must be some reason behind it to avoid statutory compulsion, a direct petition is filed. This is an apprehension of the Court considering the conduct of the petitioner, knowing fully well that alternative, effective, statutory remedy is available. Such kind of approach by the Corporation to avoid the deposit which require under statutory provision and to file petition directly which are easy to file it without depositing the amount. Therefore, this, being also a one of the reason, not to entertain the petition filed by the petitioner - Corporation.

17. In view of this, according to my opinion, present petition is not maintainable and not

entertained by this Court only on the ground that petitioner having alternative, effective, statutory remedy available under the Act. This order has been passed by this Court without expressing any opinion on merits. Accordingly, present petition is summarily dismissed.

[H. K. RATHOD, J.]

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